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IN THE

Supreme Court of the United States

October Term, 1945.

No. [redacted].

AMERICAN STEVEDORES, INC.,
Petitioner,

v.

ROSARIO PORELLO,

AND

UNITED STATES OF AMERICA,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

JACOB RASSNER,
Proctor for Respondent, Rosario Porello.

GEORGE J. ENGELMAN,
Of Counsel.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth 2-0689

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

AMERICAN STEVEDORES, INC.,
Petitioner,

v.

ROSARIO PORELLO,

AND

UNITED STATES OF AMERICA,
Respondents.

No. 996.

Brief in Opposition to Petition for Writ of Certiorari.

Statement.

The subject matter of the case at bar is a simple negligence action with no federal question of substance involved.

Rosario Porello suffered a broken back on the 23rd day of September, 1942, while employed as a stevedore by the contracting stevedore, American Stevedores, Inc., aboard the Navy Transport, *Thomas Stone*, which was owned by the United States (R. 21a).

While stowing cargo in the #1 hold of the vessel, a strongback or thwart ship beam together with several

hatch covers fell striking Porello and causing him serious and permanent injuries (R. 120).

The plans of the vessel called for a locking device to hold the strongback in place, but the same being broken off or missing resulted in a beam falling and causing the accident (R. 121).

The Trial Court found that the United States of America was negligent in failing to provide a reasonably safe place wherein to work and that American Stevedores, Inc., were likewise negligent in that having full knowledge of the dangerous and defective condition, proceeded with the work without taking any means or precautions to remedy the dangerous condition (R. 95a, 96a).

The Trial Court having found that the contracting stevedore was guilty of fault, accordingly held that the Government was entitled to indemnification over in accordance with the terms of the contract of indemnity between it and said contracting stevedore (R. 97a).

The only questions, being issues of fact, the petition for a writ of certiorari should not be entertained by this Court.

POINT I.

The construction of the Public Vessels Act, 46 U. S. C. A., Sec. 781, is no longer the subject of review, as every feature thereof has been fully determined by this Court in the case of Canadian Aviator, Ltd. v. United States, 324 U. S. 215, decided February 26, 1945.

Petitioner has selected a minutia of the Public Vessels Act (46 U. S. C. A., Sec. 781), as the basis for granting a writ of certiorari to this Court.

After the exhaustive examination by this Court of the legislative history of the Public Vessels Act and the Congressional intent therefore and after rendering the en-

lightening, informative and instructive opinion which was a full and complete dissertation on the construction of every feature of said Act, so luculently expressed in the opinion in the recent case of *Canadian Aviator, Ltd.* v. *United States, supra,* it seems somewhat presumptuous to ask this Court to redeliberate this question.

This Court stated in the *Canadian Aviator, Ltd.* v. *United States* case, *supra,* that Congress intended to adopt the customary legal terminology of the Admiralty Law and consequently there seems no need for the United States Supreme Court to be called upon to tell the lower Admiralty Courts of this country what is meant by the word "damages" when applied to an admiralty tort.

The norm laid down by this Court seems reasonable enough, that a word should be given its customary legal terminology and it does not seem necessary to ask this Court to give the meaning of each and every word of an Act by a separate decision or opinion.

The petitioner has inadvertently stated that there is some doubt as to whether the word "damages" was intended by Congress to include personal injury claims.

The error of such statement becomes obvious when reference is made to Senator Bayard's explanation to the Senate on February 12, 1925, of the purpose of House Bill 9535 which became the Public Vessels Act, when he stated that the Act was for the purpose of giving

> *"a person aggrieved because of an accident by reason of the shortcoming of a United States ship the right to go into the district court and prosecute his action* • • •."

He stated this referred to

> "• • • *all maritime accidents of any kind* • • •."

Petitioner's reference to legislative history of the Act controverts its conclusion. Such reference establishes the fact that not until after the restrictions to:

1. "Property damage" (as stated by Mr. Underhill, Petitioner's Brief, p. 14) and

2. "Damage by collision",

were removed did Congress give favorable consideration to the bill, which subsequently became the Public Vessels Act.

It is difficult to see the relevancy of petitioner's reference set forth on pages 14 and 15 of its brief, as these Bills refer to:

a. Accidents ashore.

b. Compensation claims.

c. Appropriations by Congress where claims were settled without a law suit.

(The Bills set forth in the 2nd paragraph on page 15 of petitioner's brief, merely show that in order to obviate law suits, the claims of Edna M. Callahan and others for injuries suffered by an explosion aboard a Navy motor launch on October 10, 1932, were settled without putting the claimants to the expense or trouble of litigation. See letter of Claude A. Swanson, Secretary of Navy, dated September 1, 1933, submitted with Report #33, 75th Congress, 1st Session of House of Representatives, which accompanied H. R. 601.

Such appropriations were then necessary regardless of whether the claims were for personal injuries or property damage against the United States, and irrespective of whether the money was required to pay a judgment entered on a decree or a settlement agreed upon without litigation).

The fact that Congress was endeavoring to enact further legislation for protection of persons injured ashore, of persons in the Government employ, for *both* property damage and personal injury damage claims and the fact

that claims were settled by the Government without litigation throws no light on the intent of Congress in passing the Public Vessels Act.

Congress never was satisfied to enact special legislation for the protection of shipowners to the exclusion of persons suffering personal injury.

Many of our Congressmen objected to special privilege being extended to shipowners and operators to the exclusion of personal injury claimants and others, as shown by the following (p. 43 of the Report of the Hearings of the 66th Congress, 3rd Session, Feb. 7, 1921, Report No. 1301 of the House of Representatives):

> "Colonel Lee: But why the door should be opened to these shipowners, with all due respect to them, as they are an extremely worthy set, to press their claims in tort against the Government, and not to every other tort sufferer, so to speak, is not clear. If the shipowners are allowed to sue, then everybody else having a tort claim against the government it seems to me, in justice should be allowed the same relief."

(p. 44 of the same Report):

> "Mr. Igoe: For instance, we have before the Committee, speaking of torts, the proposition of allowing persons who sustain personal injuries by reason, for instance, of the negligent operation of Government automobiles of the Post Office Department, to bring suit against the Government. Some of us feel that while we are passing laws for the rehabilitation of cripples in industry, we might take care of a few cripples that the Government is responsible for, and I just wondered if there is not a difference between subjecting the Government to tort actions ordinarily and this particular case."

Mr. Upshaw said, at 66 Cong. Rec. 2087:

> "Quite a number of us are interested in cases of this kind, where lives of people are lost by reason of their being run over by Government trucks, and things of that kind. Is it possible to bring in an omnibus bill before this Congress ends that will give to those interested an opportunity to proceed for the settlement of those claims?"

Mr. Underhill replied:

> "* * * I shall devote some of my time in the summer vacation to the formulation of a bill which I shall present to Congress at the next session; so that the old idea, abandoned on the continent, that 'the king can do no wrong,' will be abandoned here in the United States, and the people of the United States will be able to secure justice from their Government."

Such bills were not acceptable to Congress.

Finally, the restriction limiting suits in admiralty by owners of vessels was stricken out.

The restriction limiting the causes of action to property damage resulting from collision was stricken out.

In place thereof, House Bill 9535 was submitted which provided:

> *"That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States,* * * *"*

This bill was passed by Congress and became law, Mar. 3, 1925, c. 428, Sec. 1, 43 Stat. 112, 46 U. S. C. A., Secs. 781 to 790, commonly known as *Public Vessels Act*.

The effect of this Act was to eliminate the defense of sovereign immunity and to extend the rights provided by the Act of Mar. 9, 1920, c. 95, Sec. 1, 41 Stat. 525, 46 U. S. C. A., Secs. 741 to 752, commonly known as *Suits in Admiralty Act*.

The effect of the Public Vessels Act was to remove the defense of sovereign immunity, where a public vessel was involved, so that the rights provided by the Suits in Admiralty Act, to a personal injury claimant, would not be limited only to merchant vessels of the United States, but would be extended to public vessels as well. See:

> *State of Maine* v. *U. S. D. C.*, Me. 1942, 45 F. Supp. 35.

Both Acts are to be considered in *pari materia*".

The Second Circuit Court of Appeals in the case of *U. S.* v. *Caffey, Judge, et al.*, 141 Fed. (2d) 69, on page 70, stated in no uncertain terms that the two statutes are to be construed together.

The aforesaid case was an appeal of Judge Caffey's decision in the case of *Aguilines Inc.* v. *U. S. A.*, 1943 A. M. C. 715, where on page 717, Judge Caffey stated as follows:

> "• • • The two statutes are in *pari materia* (*State of Maine* v. *U. S.*, 1942 A. M. C. 1075, 45 Fed. Supp. 35, 37)."

This Court in its opinion in the *Canadian Aviator Ltd.* case, *supra*, discusses the cases of *Dobson* v. *United States*, 1928 A. M. C. 1583, 27 F. (2d) 807, and *O'Neal* v. *United States*, 1925 A. M. C. 1325, 11 F. (2d) 869, points out that both Dobson and O'Neal were of the personnel of his respective vessel and *for that reason only*, the actions could not be maintained under the Public Vessels

Act. The logical meaning therefore, is that if Dobson and O'Neal had not been members of the personnel of his respective vessel, he would have been entitled to maintain the action under the Public Vessels Act.

Robinson on Admiralty, 1939 Edition, states on page 267, speaking of the Public Vessels Act:

> "From this outline of the act it is to be seen that the United States has accepted liability for its public vessels and gives up, in its own courts, by a standing waiver, its exemption under the sovereign immunity."

Under this Act, libelant has the same rights as he would have had against the Government were the vessel involved a merchant vessel belonging to the United States.

In the *Wright* case, C. C. A. N. Y. 1940, 109 F. (2d) 699, on page 701, the court stated:

> "Whatever may have been the previous rule under *The Thekla* (266 U. S. 328), *supra*, we think with the court below that the Public Vessels Act applied to all claims against the United States for damages caused by public vessels * * *."

POINT II.

This Court will review matters involving conflicts of decisions between Circuit Courts of Appeals, but not involving conflicts of decisions between Federal District Courts, Rule 38, Revised Rules of the Supreme Court of the United States, adopted February 13, 1939, effective February 27, 1939. Amended March 25, 1940, October 21, 1940 and May 26, 1941.

However, the fact is that the decisions by the District Courts are uniform and in accordance with the uniform decisions of the Circuit Courts and the Court of Appeals of the Supreme Court of the State of New York, on the question of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Secs. 190, et seq.

The Circuit Courts are not only in accord with each other but in accord with local decisions. See:

The Etna, 138 Fed. (2d) 37 (C. C. A. 3rd C.);
Grasso v. *Lorentzen*, 149 Fed. (2d) 127 (C. C. A. 2nd C.) c. d.: Dec. 8, 1945;
Ricciardi v. *American Export Lines*, 294 N. Y. 812.

Petitioner charges the District Courts with heterogamous decisions. The following will demonstrate beyond the peradventure of a doubt that they are orthogamous.

Congress has clearly stated the essential prerequisite necessary to bar a third party action.

Navigation and Navigable Waters Act, Title 33, Sec. 933, U. S. C. A. Sub. (b).

The report of an informal conference by a claims examiner does not have the legal effect of an award by a deputy commissioner.

A claims examiner's function is never to make any finding, but solely and exclusively to aid a claimant and the employer or carrier to amicably adjust their differences, to narrow the issues and to simplify the method of proof.

See:

Code of Federal Regulations, 1941 Supp. Title 20, page 1873, under sub-division (b).

After the informal conferences have been terminated, the parties may stipulate as to agreed facts, and subdivision (d), provides the method for so stipulating in order that the stipulation may become effective.

See: *Subdivision (d)*

"Such stipulations when signed by the parties in interest shall become part of the record of the case."

The claims examiner cannot substitute for the deputy commissioner, for even one deputy commissioner may not substitute for another without the consent of the commission.

See:

U. S. C. A., Title 33, Section 919, sub-division (g).

Under *Section 919, sub-division (e)*, provision is made as to who should make the award, and it is specifically provided that the award must be made by the deputy commissioner.

Section 921 (a), provides as follows:

"A compensation order shall become effective when filed in the office of the deputy commissioner as provided in Section 919 of this chapter."

Section 919, sub-division (c), provides:

> "• • • the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim."

Insofar as the law provides who should make the award, what constitutes an award and when an award shall take effect, it remains no debatable question.

An award can be made only by a deputy commissioner, and can only become effective if made in accordance with Section 919 of the U. S. C. A. 33.

In the case of: *The Etna*, Circuit Court of Appeals, 3rd Circuit, decided September 9, 1943, 138 F. (2d) 37, on page 41, the court stated in speaking of U. S. C. A. 33, Section 933, sub-division (b):

> "This calls for the deputy commissioner's affirmative action which, together with its known legal consequences, engages his supervision on the basis of the employer's liability for compensation under the Act."

It is obvious that there is quite a distinction between voluntary payments as made in the case at bar, and payments accepted under an award as contemplated by the amendment of 1938, *supra*.

In *The Etna* case, *supra*, the court further stated on page 41, in speaking of Section 914 (a):

> "Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer."

It is obvious that the Circuit Court recognized the distinction between compensation paid, as in the case at

bar, without an award, and compensation paid under an award by a deputy commissioner.

In the case of *Toomey* v. *Waterman S. S. Corporation*, 123 F. (2d) 718, it was found as a question of fact that a deputy commissioner had made an award.

The court said as follows:

> "• • • we think that the compensation was accepted 'under an award in a compensation order filed by the deputy commissioner'. The master reported that the deputy commissioner noted in his records the disposition he had made of the plaintiff's claim for compensation."

Proof was taken by the deputy commissioner.

A written finding was made by the deputy commissioner, and the deputy commissioner recorded the award in his notes.

The deputy commissioner notified all parties concerned as to his award.

The claimant accepted payments under such award.

All of the District Court Judges who have dealt with this question have held that the acceptance of compensation, not accepted under an award by a Deputy Commissioner, is no bar to a third party action.

In the case of *Sessa* v. *Weeks Stevedoring Co.*, 56 F. Supp. 50, Judge Moscowitz held that a filed written report of a claims examiner is not an award under the Act.

He stated in part as follows:

> "It will be noted that Sec. 933 (b) requires that the award in compensation order be made by the Deputy Commissioner.
>
> In the Circuit Court of Appeals for this Circuit in the case of *Toomey* v. *Waterman*, 1942, A. M. C., Page 90 (decision filed Nov. 24, 1941), it was held

that the requirements of this section are met if the Deputy Commissioner makes a note in his records of the disposition that he has made of the plaintiff's claim for compensation, and that, under those circumstances, though the act was informal, it was equivalent to an order and satisfied the provisions of the amendment."

In the case of *Brusich* v. *Grace Line*, 56 F. Supp. 48, the claimant went so far as to settle his claim for $1,000.00 at a hearing before a claims examiner, and Judge Caffey held that he was not barred from proceeding with his third party action, the Court holding in part as follows:

"The way in which on its face such compensation shall be accepted, in order to transfer the cause of action to the employer, and thus deprive the employee of any right to maintain suit against the third person is definitely provided in subdivision (b). In order to accomplish the transfer the acceptance (says the statute) shall be 'under an award in a compensation order filed by the deputy commissioner'. It is solely by this kind of procedure that title to the cause of action for the injury can pass, in literal conformity with the statute, to the employer."

To the same effect see:

Iaria v. *Silver Line*, 56 F. Supp. 42, Judge Mandelbaum;

Cupo v. *Isthmian S.S. Co.*, 56 F. Supp. 45, Judge Leibell;

Tartaglio v. *Cunard White Star*, 56 F. Supp. 55, Judge Rifkind;

Pugliese v. *Panama Transport Co.*, Judge Coxe, 1944 A. M. C. 1101;

Barry v. *Barber S.S. Lines*, Jan. 27, 1944, civil 22-553, Judge Leibell (not reported);
Brusich v. *Grace Line Inc.*, *supra*, Judge Caffey;
Sessa v. *Weeks Stevedoring Co.*, *supra*, Judge Moskowitz.

In *Bellantuono* v. *American Export Lines, Inc.*, 1944 A. M. C. 437, where it is asserted that Judge Clancy held to the contrary, that is not so. Judge Clancy merely refused to strike out the answer as a matter of law and left the question for the Trial Court. The case being settled for approximately $12,000.00 during the trial, the question was never decided.

The Court's attention is respectfully called to two letters which are on file as Exhibits in the *Brusich* case, which show the view of the Deputy Commissioner as well as Chief Counsel for the United States Employees' Compensation Commission, which letters are submitted for such consideration as this Court may see fit to give to them.

The letters are as follows:

Official Correspondence Should Be Addressed to the Deputy Commissioner

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

DISTRICT No 2

641 Washington Street, at Christopher

New York City 14

Commissioners

JEWELL W. SWOFFORD
Chairman
JOHN J. KEEGAN
ALBERT H. LADNER, JR.

SAMUEL S. LOWE
Deputy Commissioner

In reply refer to File No. .....

June 3rd, 1943

Jacob Rassner, Esq.,
220 Broadway,
New York, N. Y.

Dear Sir:

I have your letter of June 3, 1943 inquiring as to whether a claims examiner's memorandum of conference constitutes an award by the Deputy Commissioner in this Commission, and as to whether a finding by the claims examiner is binding on the Commissioner, the insurance carrier, or the claimant.

Conferences to consider claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act are in the first instance held by a claims examiner.

This is an informal procedure, in the nature of a general discussion of the merits of the case, there is no testimony taken under oath, and the general purpose of the procedure is to expedite payment and adjustment of the claim and where possible, disposition by agreement of the parties in interest. At its conclusion, the claims examiner files a "memorandum of conference" copies of which are supplied all interested parties. It is supposed to detail the essential facts in connection with the claim, and to conclude with his recommendation in regard to payment or further indicated course of action.

In reply to your question as to whether such a memorandum can be said to be the equivalent of a finding by the Deputy Commissioner, you are advised that the Commission believes that the compensation order contemplated by the Act requires the approval and signature of the Deputy Commissioner. When such an Order is filed, it becomes binding upon the parties in interest and subject to review on questions of law by the Federal Courts within the statutory period. Memoranda of conferences are not regarded as binding upon the parties in interest and the insurance carrier may decline to comply with the recommendation of the claims examiner, the claimant may decline to accept the recommendation, and both parties retain their rights under the law to a formal hearing before the Deputy Commissioner.

Very truly yours,

SAMUEL S. LOWE,
SAMUEL S. LOWE,
Deputy Commissioner.

SSL:MB

Official Correspondence Should Be Addressed to the Commission

---

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
285 Madison Avenue
New York, 17, New York

Commissioners

JEWELL W. SWOFFORD
Chairman
JOHN M. MORIN
JOHN J. KEEGAN

WM. MCCAULEY
Secretary

In reply refer to File No. .....

December 18, 1943.

Jacob Rassner, Esq.,
220 Broadway,
New York, N. Y.

Dear Mr. Rassner:

In response to your inquiry by telephone as to the time when an election to take compensation under the Longshoremen's and Harbor Workers' Compensation Act becomes effective for the purpose of giving to an employer, by assignment under section 33 (b) of that Act, the employee's right of action against a third party, you are advised that section 33 (b) clearly states the time in the following language: "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

The purpose of the 1938 amendment to section 33 (b) in this respect is too clear for argument, as may be observed by reading the comments of the Senate Judiciary

Committee, which reported the Bill, H. R. 5690 (see Senate Report No. 1988, Calendar No. 2100, 75th Congress, 3rd Session, page 9).

Section 33 (a) of the Longshoremen's Act provides for an election (1) to take compensation, or (2) to sue the third party. Notice of election *to sue* is provided for by form US-213. Notice of election to accept compensation is not required to be given by any special form, but the filing of a claim by an employee (Form US-203) indicates the employee's purpose and intention to claim compensation; and if pursuit of the claim to the point of a formal award in a compensation order, the *claim* plus the *formal award* completes the setting for assignment to operate under section 33 (b). In view of the language of section 33 (b) and the legislative history of the 1938 amendment to this section, it could hardly be validly asserted that assignment to the employer takes place any earlier than the date of acceptance of compensation under a compensation order. An employee who files a claim, and before accepting compensation under an award, may desire to sue the third party. He would apparently have the right under the statute to exercise his third party remedy even though he had filed claim, provided he did not accept compensation under a formal award as the statute provides. The mere filing of the claim shows *prima facie* that the employee desires to pursue the compensation remedy, but, according to the statute he does not lose his right to sue the third party *until* he accepts compensation in the matter indicated. Stated otherwise, while filing of claim indicates a desire to claim compensation, the election (for purposes of working the assignment) does not become effective until compensation is accepted under an award.

Very truly yours,

W. E. Boote,
W. E. Boote,
Chief Counsel.
HPM

All of the State Court cases which held to the contrary were based on the decision in the case of *Jakuboski* v. *Matson Navigation Co.* (264 App. Div. 735, and 265 App. Div. 859), however, on January 2, 1945, the Appellate Division of the Second Department, which had decided the *Jakuboski* case, reversed itself in the case of *Ricciardi, appellant* v. *American Export Lines, Inc., respondent, supra,* as follows:

> "We believe that subdivisions (a) and (b) should be read as one continuous, integrated enactment. Thus read, there is required the holding that the acceptance of compensation which was paid without an award did not constitute an election by the plaintiff to accept compensation rather than to sue a third party (*Tartaglio* v. *Cunard White Star, Lim.*, 56 Fed. Supp. 55; *Pugliese* v. *Panama Transport Co.*, opinion by Judge Coxe in the U. S. District Court for the Southern District of New York, October 5, 1943, not officially reported; *Brusich* v. *Grace Line, Inc.*, 56 Fed. Supp. 48; *Cupo* v. *Isthmian S.S. Co. Inc.*, 56 Fed. Supp. 45; Report No. 1945, House of Representatives, 75th Congress, Third Session, entitled 'Amending the Longshoremen's and Harbor Workers' Compensation Act', dated March 14, 1938).
>
> This decision is not in harmony with our holding in the two cases of *Jakuboski* v. *Matson Navigation Co.* (264 App. Div. 735, and 265 App. Div. 859). When those cases were decided the legislative purpose and intention in amending the act in 1938, as expressed in the report to the House of Representatives and the uniform holdings of the federal courts interpreting the act as amended were not called to our attention. Such legislative expression and federal court interpretation of this federal act

make imperative retraction of our holding in the *Jakuboski* cases."

In the *Etna* case, *supra*, the Court laid down the principle that an employer is entitled to reimbursement for compensation paid to a claimant and a claimant may not have a double recovery.

As to the equities in the case, the realistic fact is that usually, the same insurance company which insures the ship, insures the employer and consequently the provision, that an employer may sue a third party to the benefit of the claimant, has no practical application of value.

In addition to the foregoing, an employer receiving lucrative contracts from a ship does not bring actions against the ship for benefit of his employee.

The fact is that a longshoreman receives but $20.00 a week to a maximum recovery of $7,500.00, regardless of the fact that he may have lost his limbs or been crippled for life or otherwise seriously and permanently incapacitated.

It is for these reasons that Congress in 1938 saw fit to amend the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U. S. C. A., Secs. 901, *et seq.* by adding subdivision (b) requiring the acceptance of compensation under an award in a compensation order filed by a deputy commissioner, in order to bar a longshoreman from his right to proceed with a third party action.

POINT III.

A disputed question of fact decided by an Admiralty Court is not a subject for review by the United States Supreme Court.

The law is well settled as stated in the case of *Campana Corp.* v. *Harrison*, 114 Fed. (2d) 400, on page 405:

"The reviewing Court does not review the evidence as an original fact finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility."

McDonald v. *Pless*, 238 U. S. 264;
Hyde v. *U. S.*, 225 U. S. 347;
Mattox v. *U. S.*, 146 U. S. 140;
8 Wigmore, Evidence (3rd Ed. 1940) 668-677, 282 ff.;
Sunderland, Verdicts General and Special 29 Yale L. J. 253 (1919).

The "Warshipsteve" agreement is not a Federal Statute. It is a contract, nor more, no less.

The fact that the United States of America is a party to it does not impose the duty on the United States Supreme Court to act as a trial tribunal and determine questions of fact, contractual intent, meeting of the minds or credibility of witnesses.

These are all matters for our Trial Courts.

The very authorities cited by petitioner establishes the fact that similar contracts were interpreted as factual questions.

All the authorities cited by petitioner fall within one or more of the following categories:

(a) The intent of the parties.

(b) The question of maintenance and control of the vessel.

(c) The sufficiency of the proof to sustain a contract of indemnity.

The case of *Shamrock Towing Co.* v. *City of New York*, 16 Fed. (2d) 199 (C. C. A. 2), is not in point as there, both parties were chargeable for the damages by

their joint torts, whereas in the case at bar the contract provided that if the contracting stevedore contributed to an accident, the Government was entitled to indemnification regardless of its fault.

The only question in the case at bar between two joint tort feasors was the right to indemnification which was clearly an issue of fact decided on conflicting evidence and consequently is not a proper subject of review by this Court.

The question of contribution is not in this ca[illegible] as there was no common liability upon the tort feasor to the injured party, A. L. I. Restitution sec. 86; 13 Am. Jur., contribution sec. 51 as libellant had no cause of action against his employer.

See

Consolidated Coach Corp. v. *Burge*, 245 Ky. 631, 54 S. W. 2d 16, 85 A. L. R. 1086;
Walker-Kroger Grocery & Baking Co., 214 Wis. 519, 252 N. W. 721, 92 A. L. R. 680.

POINT IV.

There Is No Jurisdictional Question Involved.

The question of jurisdiction cannot be validly raised as jurisdiction could rest on the fact that the indemnitee is the United States, 28 U. S. C., Sec. 41 (subd. 1) see *Tuthill* v. *United States*, 38 F. 538 (N. D. Ill.), appeal dismissed 136 U. S. 652, aside from the fact that the action was predicated upon admiralty tort and that the said admiralty tort was the subject matter of the contract of indemnity between the two joint tort feasors.

CONCLUSION.

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

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